UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.530
24 July 1996

ENGLISH
Original: FRENCH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
Geneva, 6 May-26 July 1996

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

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CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

B. Consideration of the topic at the present session

GE.96-63290 (E)

CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

1. The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work at its forty-sixth session (1994) the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 1/

3. At its forty-seventh session, the Commission received the first report of the Special Rapporteur on the topic. 2/ It considered the report at its 2400th to 2404th meetings, at its 2406th and 2407th meetings and at its 2412th and 2416th meetings.

4. The Special Rapporteur summarized as follows the conclusions he drew from the Commission's discussion of the topic under consideration:

(a) The Commission considered that the title of the topic should be amended to read: "Reservations to treaties";

(b) The Commission should adopt a guide to practice in respect of reservations. In accordance with the Commission's Statute and its usual practice, this guide would take the form of draft articles whose provisions would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements should be interpreted with flexibility and, if the Commission felt that it must depart from them substantially, it could submit new proposals to the General Assembly on the form that the results of the work might take;

(d) There was a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

5. These conclusions constituted, in the view of the Commission, the results of the preliminary study requested by the General Assembly in

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1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

2/ Document A/CN.4/470 and Corr.1.

resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. In the Commission's opinion, the model clauses on reservations, to be inserted in multilateral treaties, should be designed to minimize disputes in the future.

6. Again, at its 2416th meeting, on 13 July 1995, the Commission, in accordance with its earlier practice, 3/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. This questionnaire would be sent to the addressees by the Secretariat.

B. Consideration of the topic at the present session

7. At the present session, the Commission had before it the Special Rapporteur's second report on the topic. 4/ The report was submitted to the Commission at its 2460th meeting, held on 16 July 1996.

(a) Presentation by the Special Rapporteur of his second report

The report consisted of two quite separate chapters:

Chapter I, "Overview of the study", was on the Commission's future work on the topic of reservations to treaties and proposed a provisional general outline of the study. Chapter II, "Unity or diversity of the legal regime of reservations to treaties" dealt, on the one hand, with the legal regime for reservations and substantive rules applicable to reservations in general, and on the other hand, with the application of this general regime to human rights treaties. A bibliography on reservations to treaties was annexed to the report.

8. In chapter I, the Special Rapporteur recalled the conclusions of his first report as well as the detailed questionnaire he had prepared on reservations to treaties, so as to inquire into the practice of, and problems encountered by, States. Fourteen States had so far answered the questionnaire. In chapter I, the Special Rapporteur indicated the area covered by the study. Five major problems of substance had predominated in the discussion that had followed the presentation of the first report:

3/ See Yearbook ... 1993, vol. II (Part Two), para. 286.

4/ A/CN.4/477 and A/CN.4/477/Add.1.

(i) The definition of reservations, the distinction between them and interpretative declarations and the differences of legal regime which characterize the two institutions;

(ii) The doctrinal quarrel (which has, however, important practical consequences) between the "permissibility" and "opposability" schools, which had a bearing, eventually, on what could probably be considered prima facie as the main problem raised by the subject: conditions for the permissibility and opposability of reservations;

(iii) The settlement of disputes;

(iv) The effects of the succession of States on reservations and objections to reservations;

(v) The question of the unity or diversity of the legal regime applicable to reservations based on the object of the treaty to which they are made.

9. Significantly, quite striking agreement was found, further to the discussion in the Sixth Committee, between the members of the Commission and the representatives of States in regard to the hierarchy of the problems posed - or left pending - by the present legal regime of reservations to treaties. The main topics that caused difficulty were the following:

(i) The question of the very definition of reservations;

(ii) The legal regime governing interpretative declarations;

(iii) Objections to reservations; and

(iv) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

10. The Special Rapporteur recalled the form to be taken by further study of the topic, which should preserve the achievements of the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions and lead, if need be, to a "guide to practice in respect of reservations". Such a guide, if it was to be of any real value to States and international organizations, should be divided into chapters, in the following form:

(i) Review of the relevant provisions of the 1969, 1978 or 1986 Vienna Conventions;

(ii) Commentaries to those provisions, bringing out their meaning, scope and ambiguities or gaps;

(iii) Draft articles aimed at filling the gaps or clarifying the ambiguities,

- commentaries to the draft articles;

(iv) Model clauses which could be incorporated, as appropriate, in specific treaties and derogating from the draft articles;

- commentaries to the model clauses.

11. The provisional general outline envisaged by the Special Rapporteur would consist in principle of the following chapters:

I Unity or diversity of the legal regime of reservations to multilateral treaties (reservations to human rights treaties);

II Definition of reservations
(This chapter would also discuss the question of interpretative declarations and their legal regime);

III Formulation and withdrawal of reservations, acceptances and objections;

IV Effects of reservations, acceptances and objections;

V Fate of reservations, acceptances and objections in the case of succession of States; and

VI The settlement of disputes linked to the regime of reservations. 5/

12. The Special Rapporteur estimated, subject to unforeseen difficulties and in view of the purely provisional nature of the estimate, that the task could be concluded within four years, so that the first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V and VI.

13. Chapter II of the report dealt, on the one hand, with the question of the unity or diversity of the legal regime of reservations to treaties and, on the other, with the specific question of reservations to human rights treaties. In this regard, the Special Rapporteur emphasized that this chapter, (item I of the general outline proposed in chapter I of his report) sought to determine whether the rules applicable in respect of reservations to treaties (whether codified by the 1969 or 1986 Conventions or customary in character) were applicable to all treaties, regardless of their object, and particularly to human rights treaties. He recalled that the question had been posed with

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5/ See document A/CN.4/477, para. 37.

some insistence both during the debate and during the discussion in the Sixth Committee of the General Assembly at its fiftieth session. The question corresponded to concerns raised by the practice and recent - and controversial - jurisprudence of human rights treaty monitoring bodies in regard to reservations. It therefore seemed necessary to him for the International Law Commission to state the view of general international law of which it was one of the organs. It was for that reason that the Special Rapporteur deemed it advisable to tackle the subject in his second report, for it seemed to him to be a matter of some urgency.

14. The first question concerned the unity or diversity of the legal regime(s) applicable to reservations and could be posed in these terms: do some treaties (for example, "normative" treaties) escape or should they escape the application of the Vienna regime because of their object? If so, to what particular regime(s) were those treaties subject or should they be subject in regard to reservations? This question of principle could be examined in three stages.

15. (a) First, the Special Rapporteur discussed the diversity of treaties and the legal regime of reservations. He held the view that it was prudent to confine the study only to normative treaties, setting aside other categories of treaty (limited treaties, constituent instruments of international organizations, bilateral treaties, etc.) either because they have already been the subject of separate treatment (particularly in the 1969 and 1986 Vienna Conventions) or because he intended to deal with them at a later stage in the study. On the other hand, "normative" treaties ("codification" or human rights conventions or conventions establishing rules of conduct for all States in legal, technical, social, humanitarian and other fields) posed special problems for the topic under consideration because, in the view of some, the general legal regime of reservations would not apply to them or quite simply because those instruments by their very nature would not lend themselves to the formulation of reservations, especially human rights treaties. He pointed out that this term often encompassed several classes of treaties of a very differing nature and did not constitute a homogeneous category. Furthermore, while they did have certain essential features conferred on them by their "normative" character, designed above all to institute common international

regulation on the basis of shared values, it was important not to take too simplistic a view: such treaties still contained typically contractual clauses.

16. In this context, the Special Rapporteur first considered the function of the legal regime of reservations. Two apparently contradictory interests were involved: on one side, the interest of broadening the convention, and on the other, the integral nature of the convention. The function of the rules applicable to reservations was to strike a balance between these conflicting requirements: the aim to secure broader participation and, at the same time, to preserve the ratio contrahendi, of what constituted the treaty's raison d'être.

17. The problem could also arise in terms of consent in the light of the consensus basis of the law of treaties: from that standpoint, a balance should be found between the freedom of consent of the reserving State and that of the other States parties. It was from the standpoint of these requirements that the Special Rapporteur wondered whether the legal regime of reservations set out in the 1969 and 1986 Vienna Conventions was generally applicable and, in particular, whether it was suited to the particular character of "normative" treaties (or rather, the "normative clauses" in general multilateral treaties).

18. In doing so, the Special Rapporteur discussed the background of the "Vienna regime" and its sources (travaux préparatoires, previous work of the International Law Commission, and so on) to show that the authors of the regime had been aware of these requirements and, in response, had sought to adopt generally applicable rules. Both the International Law Commission and the conferences on the codification of the law of treaties had tried to establish a single regime applicable to reservations to treaties, regardless of their nature or object.

19. (b) The Special Rapporteur then went on to consider the question of whether the "Vienna regime" was applicable more particularly to normative treaties and especially to human rights treaties. (This question was linked with the problem of the admissibility of reservations to such instruments, but it was a problem for which there was still no possible conclusion and one which depended on political or ideological considerations). There was no lack of arguments in favour of an affirmative answer (greater participation of States in such treaties, participation better than no participation) or a

negative answer (contradiction between "reservation" and human rights, particular nature of such treaties by virtue of their quasi-legislative function and the uniformity of application).

20. The Special Rapporteur none the less noted that the real legal question lay in the question of whether or not, when the contracting parties remained silent on the legal regime of reservations, the rules contained in the 1969 and 1986 Conventions were suited to any kind of treaty, including "normative" treaties, including human rights treaties.

21. In order to answer this question affirmatively, the Special Rapporteur noted that the rules applicable to this type of treaty under the Vienna Conventions struck a good balance between the concerns expressed both by the advocates of reservations and those expressed by their opponents. He also noted that the basic characteristics of the "Vienna regime", i.e. its flexibility and adaptability, had enabled it to meet the particular needs and special features of all types of treaties or treaty provisions and had led the International Law Commission, in 1963 and 1966, to rule out any exception in favour of normative treaties.

22. In its Advisory Opinion on "Reservations to the Convention on Genocide", the International Court of Justice had already drawn attention to the advantages of greater flexibility in the international practice concerning multilateral conventions, which it had applied to a human rights treaty par excellence. The Special Rapporteur identified three elements that enabled the "Vienna regime" to apply satisfactorily to all treaties, regardless of their object, including human rights treaties:

(a) The permissibility of reservations had to be evaluated in the light of the object and purpose of the treaty;

(b) The freedom of the other contracting parties to agree was fully preserved through the mechanism of acceptances and objections; and

(c) The right to "formulate" reservations was only of a residual nature, since each treaty could restrict such freedom and even prohibit any or certain reservations.

23. Consequently, the "Vienna regime" was suited to the particular features of normative treaties. The Special Rapporteur noted that problems related to the "integrity" of normative treaties, problems with regard to the

"non-reciprocity" of undertakings and problems of equality between the parties were not likely to prevent the "Vienna regime" from being applicable. It was clear that:

(a) The regime of reservations established by the 1969 and 1986 Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, regardless of their object, with the exception of certain treaties concluded by a limited number of parties and the constituent instruments of international organizations, for which some limited exceptions were made;

(b) Because of its flexibility, the regime was suited to the particular characteristics of normative treaties, including human rights instruments;

(c) While not ensuring their absolute integrity, which was scarcely compatible with the actual definition of reservations, it preserved their essential content and would guarantee that it was not distorted;

(d) This conclusion was not contradicted by the arguments alleging the so-called violation of the principles of reciprocity and equality between the parties: if such a violation occurred it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections were hardly compatible with the actual nature of normative treaties, which were not based on reciprocity of the undertakings given by the parties;

(e) There was no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it was considered that they must be prohibited, the parties were entirely free to exclude them or limit them as necessary by including an express clause to this effect in the treaty, a procedure which was perfectly compatible with the Vienna rules, which were only of a residual nature.

24. (c) In the third place, the Special Rapporteur considered the implementation of the general reservations regime and, in particular, the application of the Vienna regime to human rights treaties. In practice, the basic criterion of the object and purpose of the treaty was applied to reservations to such treaties (including those cases where there were no reservations clauses). This basic principle was embodied in the texts of several human rights treaties and the practice of States: the particular nature of normative treaties therefore had no effect on the reservations regime.

25. Referring to machinery for monitoring the implementation of the reservations regime, the Special Rapporteur noted that additional forms of control carried out directly by human rights treaty monitoring bodies had developed since the Vienna Conventions. There were thus two parallel types of monitoring of the permissibility of reservations in this regard: traditional mechanisms (monitoring by the contracting States and, as appropriate, by the courts in the dispute settlement context) and the human rights treaty monitoring bodies. The role of the latter in respect of reservations had acquired genuine significance in the past 15 years both at the regional level (practice of the Commissions of the European and Inter-American Courts of Human Rights) and at the international level (the Committee on the Elimination of Discrimination against Women and, in particular, the Human Rights Committee, 6/ etc.).

26. The basis for the control carried out by the monitoring bodies was linked to their mandate itself. Since these instruments established bodies to monitor their implementation, these bodies had the competence vested in them by their own powers, in accordance with a general principle of law that is well established and recognized in general international law. These bodies would be able to carry out their functions only if they could be sure of the exact extent of their competence vis-à-vis the States concerned and such competence depended on the scope and validity of the expression of consent to be bound. In practice, moreover, the monitoring bodies verified the permissibility of reservations on the basis of the criterion of the object and purpose of the treaty. The Special Rapporteur noted that, consequently and in view of this development, a combination of the various means of verifying the permissibility of reservations existed with regard to human rights treaties (traditional monitoring by the contracting States in parallel with the control exercised by a monitoring body, when that body had been established by the treaty, in addition to other bodies, such as international jurisdictional or arbitral bodies, in the dispute settlement context, and even national courts). This situation does not exclude - in fact, it implies - a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control.

6/ See General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994.

27. The Special Rapporteur looked into the consequences of the findings of monitoring bodies. According to some opinions based on the principle of the "severability" of the reservation (the possibility of severing it from the rest of the expression by a State of its consent to be bound), only an "impermissible" reservation should be regarded as null and void, whereas the State continued to be a party to the treaty. However, this approach was contrary to the consensual principle, the basis of any treaty undertaking.

28. The Special Rapporteur nevertheless considered that the legal force of the findings made by monitoring bodies in the exercise of their determination power could not exceed that resulting from the powers vested in them for the performance of their general monitoring role. Thus, even where a reservation was found to be impermissible, they could not take the place of the State in determining whether or not it had intended to be bound by the treaty despite the impermissibility of the reservation. It was always the responsibility of States and States alone to rectify any impermissibility after having examined the findings in good faith.

29. In no case could any organ for determining the permissibility of reservations take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it was prepared to assume; the State itself was thus responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation. That "remedy" might take the form of the withdrawal of the impermissible reservation, its amendment along lines compatible with the object and purpose of the treaty or the termination of the State's participation in the treaty.

30. By way of conclusion, the Special Rapporteur summarized the main findings contained in his report. He noted that reservations to treaties did not require a normative diversification; the existing regime was characterized by its flexibility and its adaptability and it achieved satisfactorily the necessary balance between the conflicting requirements of the integrity and the universality of the treaty. That objective of equilibrium was universal. Whatever its object, a treaty remained a treaty and expressed the will of the States (or international organizations) that were parties to it. The purpose of the reservations regime was to enable those wishes to be expressed in a balanced manner and it succeeded in doing so in a generally satisfactory way.

It would be unfortunate to call the regime into question by attaching undue importance to sectorial considerations that could perfectly well be accommodated within the existing regime.

31. According to the Special Rapporteur, this general conclusion must nevertheless be tempered by two considerations:

(a) First, it was undeniable, that the law had not been frozen in 1951 or 1969; issues which had not or had scarcely arisen at that time had since emerged and called for answers; the answers could be found in the spirit of the "Vienna rules", although they must be adapted and extended, as appropriate, whenever that was found to be necessary;

(b) Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances was to adopt appropriate rules by the conclusion of treaties - and that could be easily done in the area of reservations through the adoption of derogating reservations clauses, if the parties saw a need for them.

32. No determining factor seemed to require the adoption of a special reservations regime for normative treaties or even for human rights treaties. The special nature of these instruments had been fully taken into account by the Judges in 1951 and the "codifiers" of later years and had not seemed to them to justify an overall derogating regime.

33. There was reason to believe, however, that the drafters of the Vienna Conventions had never envisaged the role which the bodies for monitoring certain treaties might have to play in applying the reservations regime they had established, especially in the area of protection of human rights. But this role could easily be circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities assigned to those bodies.

34. The Special Rapporteur recalled that his report contained a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to clarifying the legal aspects of the matter.

35. Owing to the lack of time, the Commission was unable to consider the report and the draft resolution. It decided to defer the debate on the topic until next year. However, several members congratulated the Special Rapporteur on the excellent exhaustive, lucid and balanced report he had

prepared on an extremely complex and sensitive issue. Accordingly, they recalled that it would be advisable for the Commission to give detailed consideration to some questions raised by the report, possibly taking account of other types of normative treaties. The fact that the Special Rapporteur had annexed a bibliography to his report was also praised. Some members expressed regret that the Commission had not found time to take action on the report at its forty-eighth session.

36. Some members also said that they agreed in principle with the idea of adopting a resolution along the lines proposed by the Special Rapporteur. Other members did not object to it, but expressed doubts about the advisability of such a resolution.

37. The question of the establishment of a working group on that question was also raised.